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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 724

JOHN P. ANDREWS, ALBERT BOYD AND GLADYS BOYD, WILLIAM E. COX AND LILLIAN I. COX,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Claims

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UNITED STATES OF AMERICA,

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Petition for a Writ of Certiorari to the United States Court of Claims

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the United States Court of Claims is reported at 295 F2d 819 and reprinted in Appendix A.

JURISDICTION

The judgment of the Court of Claims was entered on November 1, 1961. On January 30, 1962, by order of Chief Justice Earl Warren, the time within which to file a petition for a writ of certiorari was extended to and including February 13, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

The first question presented is whether tips received by the taxpayers, who were taxi drivers during the years involved in this suit, constitute gross income to the taxpayers, as defined in Section 61(a) of the Internal Revenue Code of 1954, or whether the tips constitute gifts, as defined in Section 102(a) of the Code, and are therefore excludable from gross income.

Assuming, without by any means admitting, that a proper interpretation of federal law, applied to the totality of credible facts in the present suit, would cause this Court to decide that the tips under dispute constitute gross income, the second question presented is whether the Commissioner has so ignored the principle of "equality" by his long-continued failure to tax analagous payments to other employees that the Doctrine of Equal Treatment should be invoked against the Government by this Court as a matter of fair dealing and good conscience.

The third question presented is whether it was the intention of Congress to include tips in Section 61(a) of the 1954 Revenue Code, and whether, if this was not the case, Treasury Regulations of long standing, which declare tips to be included in that section, are binding on the courts or of no legal significance.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.

(26 U.S.C. 1958 ed., Sec. 61.)

SEC. 102. GIFTS AND INHERITANCES.

(a) *General Rule.*—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

(b) *Income.*—Subsection (a) shall not exclude from gross income—(1) the income from any property referred to in subsection (a); or (2) where the gift,

bequest, devise, or inheritance is of income from property, the amount of such income.

* * * * *

(26 U.S.C. 1958 ed., Sec. 102.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.61-2 *Compensation for Services, Including Fees, Commissions, and Similar Items.*—

(a) *In general.* (1) Wages, salaries, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, bonuses (including Christmas bonuses), termination or severance pay, rewards, jury fees, marriage fees and other contributions received by a clergyman for services, pay of persons in the military or naval forces of the United States, retired pay of employees, pensions, and retirement allowances are income to the recipients unless excluded by law. * * *

STATEMENT

Petitioners John P. Andrews, Albert Boyd and William E. Cox were employed by the Yellow Cab Company of San Francisco, California as taxicab drivers during the years 1955 through 1957. Petitioners Gladys Boyd and Lillian I. Cox are petitioners herein for the sole reason that they filed joint income-tax returns with their respective husbands for the years 1955 through 1957.

The master agreement between the taxpayers' union and Yellow Cab Company of San Francisco, California provided for wages of $10.30 per day, based on an 8 hour day, or 50% of the weekly bookings, whichever was greater. This amount was later increased to $10.50 per day and again increased on June 1, 1957 to $11.00 a day. Fringe benefits

under the agreement consisted of a health and welfare plan, vacations of one or two weeks to eligible employees, and a pension plan which became effective June 1, 1957.

As set forth in the Report of Commissioner William E. Day of the United States Court of Claims, all of whose findings were accepted verbatim by the lower Court, petitioners and defendant entered into a stipulation at the trial as follows:

> "* * * At no time during the said period did the three plaintiffs render any service to any of their passengers who gave them tips or gratuities different from or greater than the service rendered by the three plaintiffs to any of their other passengers who did not give them tips or gratuities during the period. At no time during the period did the three plaintiffs request tips from any passengers or indicate disapproval in any manner whatsoever to any passenger who did not give them a tip or gratuity."

Commissioner Day's report states that while most passengers did tip petitioners, many did not. It was stipulated that the amount of tips received by plaintiffs equalled 10% of the fares collected by them, so there is no dispute between the parties in regard to the amount of the judgment awarded by the lower Court.

A local ordinance of the City of San Francisco specifically provided that no charge was to be made by any driver for loading or unloading baggage, and Section 1138(b) of the Police Code of San Francisco (in effect during the taxable years in dispute) provided for immediate suspension of the license of any driver or operator who solicited tips from any passenger, and revocation of his license, if the charges were duly proved.

The average daily wage paid to its drivers by Yellow Cab Company of San Francisco, California, for the years

in dispute was as follows: 1955, $12.16; 1956, $12.39; 1957, $12.55. These amounts do not include fringe benefits.

On pages 1 through 7 of plaintiffs' opening brief in the lower Court are set forth exceptions to the refusal of Commissioner Day to include in his Findings of Fact certain proposed Findings requested by petitioners and there set forth. All of these proposed Findings were rejected by the lower Court in arriving at its decision. Petitioners assert that these proposed Findings are uncontradicted, credible, fully supported by the transcript references set forth, and necessary to any proper and objective decision in this case. Herein follows a summary of some of the more important ones.

On trips when the meter reading was less than $1.00, which comprised at least 50% of the trips of petitioners during the years in dispute, they more often received a larger tip when the meter fare was 70c than when it registered 90c or $1.00.

When passengers were using taxicabs on trips having a business purpose and paid the meter fare by vouchers or charge accounts, they rarely tipped petitioners. During the years in dispute the percentage that tips received by petitioners bore to the amounts shown on their meters declined as the meter fares increased, with the result that a much smaller percentage of passengers tipped when the meter fare exceeded $6.00 than when it showed $2.00 or less.

Passengers whose baggage was handled by plaintiffs did not tip them more often nor in amounts larger or smaller than those received from passengers who had no baggage.

No significant services were rendered by petitioners which were not required to be rendered by them under the provisions of the working agreements between their employer and the union and for which they were not fully compensated thereunder.

REASONS FOR GRANTING THE WRIT

1. One fundamental reason for granting the writ lies in the fact that the issue affects a very large number of taxpayers, who are generally in the lowest tax brackets and can ill afford the costs of litigation. These taxpayers include taxi drivers, waiters, bellhops, room stewards aboard ships, pullman car porters, red caps, barbers, hat check girls, and others employed in this country's depressed service industries.

This case is not directly concerned with tips to employees in other service industries, to the extent that a reversal of the lower Court would become *ipso facto* a precedent that all such tips are thereafter to be considered gifts, regardless of the intention of the persons rendering the tips.

However, this case is directly concerned with tips to employees in other service industries to the extent that affirmance of the lower Court's decision would become a precedent that all such tips are thereafter to be considered compensation for services rendered. No other tipping situation so cogently carries with it circumstances from which this Court *could* find, and in the sincere belief of the petitioners *should* find, an intention on the part of the tipper to bestow a small gift or gratuity on the person tipped.

The Internal Revenue Service has explicitly included tips since 1918 in Treasury Regulations defining "Compensation for Services", as these words have been used in the Internal Revenue Code. Because of the costs of litigation, the small amount of any one taxpayer's financial stake in the issue, and the low income of the class of taxpayers affected, there has been only one decision since 1918 which has challenged these Regulations. It was decided in favor of the Government. *Roberts v. Commissioner*, 10 T.C. 581, affirmed 176 F.2d 221 (9th Cir., 1949).

The rationale of the *Roberts* decision would reverse not only *Bogardus v. Commissioner*, 302 U.S. 34, but would have made it unnecessary for this Court to have considered the factual situations presented in *Commissioner v. Duberstein*, 363 U.S. 34; *United States v. Kaiser*, 363 U.S. 299, and its companion case, *Stanton v. United States*.

As amplified in a supplemental brief presented to the lower Court, which it refused to accept for filing and consideration, the *Roberts* decision is readily distinguishable from the present case on the facts, as well as being legally out of harmony with the basic principles so recently laid down in the *Duberstein*, *Kaiser*, and *Stanton* decisions, supra.

The lower Court cites as controlling authority in its decision *Roberts v. Commissioner*, supra, and a footnote which appears on page 285 of this Court's opinion in *Commissioner v. Duberstein*, 363 U.S. 278. The footnote is cited as authority for the proposition that "Where the payment is in return for services rendered", it is income whether or not the payor derives economic benefit from it. It reads as follows:

> "The cases including 'tips' in gross income are classic examples of this. See, e.g., *Roberts v. Commissioner*, 176 F.2d 221."

No doubt, the lower Court may have considered itself compelled to regard this footnote as compelling authority. If so, petitioners respectfully demur on the basis that the *Roberts* case is readily distinguishable from the case at bar, *if the lower Court had considered the totality of facts in the Record, which it had the duty to do but demonstrably failed to do.* Petitioners obviously concede that the proposition itself is unimpeachable.

Fully recognizing that the fact-finding tribunal as a general rule has exclusive power and authority to decide on

issues of fact, and that primary weight in this area must be given by this Court to its conclusions, petitioners assert that the lower Court committed reversible error in excluding from its Findings of Fact all of their Proposed Findings, which are set forth on pages 1 through 7 of their opening brief. As previously stated, the facts contained therein were accurate summations of relevant, uncontradicted, important, and credible testimony, necessary to be considered in arriving at a just decision.

Failing to apply its experience to *the totality of facts* in this case, the lower Court cannot properly claim immunity from a proper review of *all* facts by this tribunal in order to make sure petitioners have received the fair and equitable treatment to which all litigants are entitled.

2. A second fundamental reason for granting the writ is based on the Doctrine of Equal Treatment, since substantial payments in kind to other employees are not taxed and have never been taxed by the Treasury Department, although these payments are received by employees from their employers, and are more directly motivated by economic considerations than were the tips received by petitioners from strangers.

Section 61(a) of the 1954 Internal Revenue Code (26 U.S.C. 1958 ed., Sec. 61(a)) was not meant to change the meaning of Section 22 of the 1939 Code, where gross income was defined to include compensation for personal services "of whatever kind and in whatever form paid".

Petitioners pointed out in their opening brief in the lower Court that employees of scheduled airlines are entitled annually to free round-trip passages for themselves and their immediate family to any point on their employer company's route; that passes issued by a railroad company to its employees and their families for use when not engaged on business for the company have been and still are held to

be gifts by the Commissioner; that employees of the major automobile companies receive "courtesy" discounts on purchases of their company's products; that the same is true of employees of the major oil companies on purchases of their company's gasoline, oil and other products; that employees of department stores and other retail establishments are allowed "courtesy" discounts of 20% and more on purchases of their employers' merchandise.

It was asserted by petitioners that the Commissioner, as a matter of policy and practice, had never required employees to include in their gross income for tax purposes the reasonable value of these gifts in kind.

The defendant in its answering brief replied to this charge as follows:

> "The first section of taxpayers' brief contains a discussion of a number of types of *monetary* or *non-monetary* payments said not to be income to the recipients. The argument is, apparently, that if these payments are not considered income tips should not be either. This line of reasoning contains a number of defects. First, one is not at all sure whether taxpayers contend that tips should not be income, or that benefits such as free trips for airline employees should be income (Br. 13). The latter conclusion certainly seems more reasonable, despite a 1921 ruling to the effect that railroad passes were not at that time considered income to employees under certain circumstances. O.D. 946,4 Cum. Bull. 110. The weakness of taxpayers' position is indicated by the authority cited in its support." (p. 17)

Petitioners on pages 12 and 13 of their Supplemental Brief suggested that the lower Court, in accordance with Rule 48 of its Rules of Court, refer this case back to Commissioner Day, and require defendant to submit evidence to confirm or prove erroneous the examples of unequal tax treatment cited above. Considering the virtual immunity of

Treasury Department employees from being subpoenaed to testify in a civil action, the fact that the Trial Commissioner could spare only one day in San Francisco for the hearing of this case, and the inability of petitioners to finance a nationwide investigation, this request seemed the only practical approach to obtain certain proof of what has yet to be denied by defendant. The motion to file the supplemental brief was denied, and consequently this request was not considered by the lower Court.

Petitioners sincerely believe that if fairness is a matter for judicial concern, of which they have no doubt, the requested writ should be granted. Petitioners submit further that fairness should likewise be a matter of administrative concern, and that the Government, unlike the ordinary litigant, has the duty of exercising the utmost good faith when sued by its citizens and has an obligation to produce all facts in its possession which are necessary to a fair decision in this case or in any case where it sues or is sued.

Petitioners assert that their belief is or should be shared by all those in federal offices of great administrative responsibility. This belief has been well expressed in a letter from the Honorable Herbert Brownell Jr., former Attorney General of the United States, dated October 27, 1953, and addressed to John E. McClure, Esq., General Chairman of the One Hundredth Anniversary of the Court of Claims. This letter is reproduced on page 22 of the brochure entitled "The United States Court of Claims-Its Centennial", and reads in part as follows:

> "The interest of the Department of Justice in the Court of Claims goes, of course, far beyond the advocate's role assigned to it by law. Having in mind the fundamental principles which found expression in the establishment of the court, the Department, in appear-

> ing before the court to defend the Government's interest, conceives its function to transcend that of the ordinary litigant, interested only in winning another case. It is at all times fully conscious of the duties and obligations it owes not only to the court, but to the public at large, to make certain that all the facts and the law are fully and fairly presented so that justice in its fullest measure will prevail. For justice between the citizen and his Government is the very essence of our American system."

Mr. Justice Frankfurter stated in his concurring opinion in *United States v. Kaiser*, 363 U.S. 299:

> "The Commissioner cannot tax one and not tax another without some rational basis for the difference. And so, assuming the correctness of the principle of 'equality', it can be an independent ground of decision that the Commissioner has been inconsistent, without much concern for whether we should hold as an original matter that the position the Commissioner now seeks to sustain is wrong." (p. 308)

3. A third fundamental reason for granting the writ is to review the extent to which Treasury Regulations of long standing, which have survived repeated enactment of the section they interpret, are considered binding on the courts. This is the rock on which defendant has erected its legal structure in this case.

Petitioners maintain that if Section 1.61-2 of Treasury Regulations on Income Tax (1954 Code) incorrectly construes Section 61(a)(1) of the Code by declaring tips as included within the words "Compensation for services, including fees, commissions, and similar items", as used in that Code section, this regulatory section was stillborn at its inception in regard to tips, and no amount of

reenactment can resuscitate it. *United States v. Calamaro*, 354 U.S. 351; *Helvering v. New York Trust Co.*, 292 U.S. 455.

As stated in *Boardman v. Commissioner*, 302 U.S. 34:

> "If the sum of money under consideration was a gift and not compensation, it is exempt from taxation and cannot be made taxable by resort to any form of subclassification." (p. 40)

It is significant to note that tips are not considered "Wages" under the Social Security Act, the Federal Unemployment Tax Act, the Federal Insurance Contributions Act, the Railway Retirement Act, nor are tips withheld from wages under the withholding regulations. Revenue Ruling 30-252.

The intention of Congress to include tips within Section 61(a) of the 1954 Revenue Code is neither distinct nor definite nor supported by the wording of that section. Petitioners therefore invoke a long standing rule of this Court that doubts in the interpretation of taxing statutes must be resolved against the Government and in favor of the citizen. *Miller v. Nat. Mayflower Co.*, 284 U.S. 498, 508; *Gould v. Gould*, 245 U.S. 151, 153.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari in this case should be granted.

Respectfully submitted,

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(Appendix Follows)

APPENDIX

United States Court of Claims.—Nov. 1, 1961.

John P. Andrews, Albert Boyd and Gladys Boyd, William E. Cox and Lillian L. Cox

vs.

United States.

No. 112-59.

OPINION

Action for recovery of income taxes paid by plaintiffs. The Court of Claims held that the tips received by taxicab drivers were includable in their gross income and did not constitute gifts.

Petition dismissed.

Internal Revenue 341

Tips received by taxicab drivers constituted gross income to them and were not gifts. 26 U.S.C.A. (I.R.C. 1954) §§ 61, 102.

Peter H. Behr, San Francisco, Cal., for plaintiffs.

J. Mitchell Reese, Jr., with whom was Asst. Atty. Gen. Louis F. Oberdorfer, for defendant. Lyle M. Turner and Philip R. Miller, Washington, D. C., were on the brief.

PER CURIAM

This is a suit by plaintiffs who are taxi drivers for the recovery of income taxes paid by them for the years 1955-1957. The sole question involved is whether tips received by plaintiffs constitute gross income to them, as defined in section 61(a) of the Internal Revenue Code of 1954, 68A

Stat. 17, 26 U.S.C. § 61 (1958 ed.), or whether the tips constitute gifts as defined in section 102 of the Code, 68A Stat. 28, 26 U.S.C. § 102 (1958 ed.). We believe that the tips received by plaintiffs are includable in gross income and in so holding we agree with and rely on the decision by the Tax Court in Roberts v. Commissioner, 10 T.C. 581, aff'd 9 Cir., 176 F.2d 221 (1948). See also Commissioner v. Duberstein, 363 U.S. 278, at page 285, footnote 7 (1960), 80 S.Ct. 1190, 4 L.Ed.2d 1218. Plaintiffs are therefore not entitled to recover and their petition will be dismissed.

It is so ordered.

Findings of Fact

The court, having considered the evidence, the report of Trial Commissioner William E. Day, and the briefs and argument of counsel, makes findings of fact as follows:

1. Plaintiffs John Andrews, Albert Boyd, and William Cox were employed as taxicab drivers in San Francisco, California, during the years 1955 through 1957. Plaintiffs Gladys Boyd and Lillian Cox are parties to this action for the sole reason that they filed with their husbands joint income tax returns for the years 1955 through 1957. (Hereinafter, all findings refer to the years 1955 through 1957 and the term "plaintiffs" refers to the plaintiff taxicab drivers.)

2. The plaintiffs were members of Chauffeurs' Union, Local 265. Each plaintiff was employed by the Yellow Cab Company of San Francisco, California.

3. By this action, the plaintiffs seek refund of income taxes paid for the years 1955, 1956 and 1957 as to which deficiencies had been assessed by the Commissioner of Internal Revenue on account of tips received by the plaintiffs. The question for determination is, are such tips gifts or gratuities, or compensation?

4. At the beginning of the trial, the parties stipulated and agreed that "tip" means the payment by a passenger to a taxicab driver of an amount of money over and above the required charge shown on the meter of the taxicab for the particular trip in which the tip was rendered and that it was recognized by the passenger, the driver, and the employer that the tip was the personal property of the driver upon receipt. The tips were received concurrently with the payment of fares by passengers.

5. It was further stipulated and agreed to in words, as follows:

> "* * * At no time during the said period did the three plaintiffs render any service to any of their passengers who gave them tips or gratuities different from or greater than the service rendered by the three plaintiffs to any of their other passengers who did not give them tips or gratuities during the period. At no time during the period did the three plaintiffs request tips from any passengers or indicate disapproval in any manner whatsoever to any passenger who did not give them a tip or gratuity."

6. The amount of the fare for each trip was computed by a meter which was connected to the running gear of the taxicab. This was required by local ordinance of the City of San Francisco, which also fixed the rates which might be charged at 50 cents for the first one-fourth mile, 10 cents for each additional one-fourth mile, and ten cents for each 2½ minutes of waiting or traffic delay time.[1] A stated schedule of rates was also provided for trunks and large baggage which could not be conveniently carried within the vehicle. The ordinance specifically provided that no charge was to be made by the driver for loading or unloading baggage.

---

1. Apparently the rates were somewhat lower than those quoted herein prior to June 1, 1957. See p. 2 of Joint Exhibit 3.

7. Section 1438(b) of the Police Code of San Francisco, in effect during all periods material herein provides as follows:

> "Excessive Charges. Any charges made, or sought to be made, any patron of a public passenger vehicle for hire in excess of the charges authorized by this Article for the particular type of service rendered or sought, when shown either by confession of the party, or competent testimony, or any failure on the part of any driver or operator of any public passenger vehicle for hire to make proper returns to his employer, shall result in immediate suspension of the license of such driver or operator until such time as, after due process, such license is either reinstated or revoked.
>
> "Either the person, or the employer of a person, responsible for any overcharge shall be required to make restitution to any defrauded patron, for the amount of such overcharge."

8. The working agreement between the plaintiffs' union and the taxicab operators of San Francisco was contained in a master agreement entered into between the various employers of taxicab drivers and the union. This agreement was the basis upon which the plaintiffs' employment was carried out. In general, it provided for a day to consist of not more than nine hours of straight shift time out of twenty-four hours, with one hour off for lunch four hours after the beginning of the shift. The provision for wages was $10.30 per day, computed on an hourly basis, or 50 percent of the weekly bookings whichever was greater, the same to be in lieu of all other commissions and bonuses. Effective June 1, 1955, this amount was increased to $10.50 per day, and it was again increased to $11 effective June 1, 1957. There were additional benefits provided such as a health and welfare plan, and also vacations of one or two weeks to eligible employees. A pension plan became effective June 1, 1957.

9. The Yellow Cab Company of San Francisco owned and operated the taxicabs driven by the plaintiffs in their work. This company furnished the gasoline, oil and provided necessary repairs and maintenance on the taxicabs.

10. The average daily wages paid to San Francisco Yellow Cab Drivers for the years in suit was as follows: 1955, $12.16; 1956, $12.39; 1957, $12.55. This amount did not include fringe benefits.

11. The parties have agreed and the testimony confirms that the amount of tips received by the plaintiffs equalled ten percent of the fares collected by them. It is clear from the evidence that while most passengers did tip the drivers, many did not.

12. The rules issued by the Yellow Cab Company contain the following provisions:

"Courtesy

"On stands covered by more than one cab, a patron is entitled to take any cab he chooses. First-up rule cannot apply when patron chooses another cab. Treat all passengers with the utmost courtesy, no matter how provoking. Let tolerance and patience prevail.

"Be courteous to other motorists and pedestrians. Our motto is, 'Wave them through and watch them smile.' Be a goodwill builder by following this rule.

"During the later hours, especially in the outlying residential areas, when you are taking an unescorted lady to her home, it is part of the Yellow Cab service to wait until she has entered the house.

"Another Yellow Cab custom is saying 'Good morning' or 'Good evening' to your patrons as they approach your cab. Also be sure to say 'Thank you' when the customer pays his cab fare. Tipping your hat will result in a lot of extra tips, especially from women. It is gentlemanly also to give a modest salute to male patrons.

"Under any and all conditions avoid arguments with patrons. Try to live up to our motto that the patron is always right, by not giving sharp or surly answers. Many times a smile or a soothing word will avoid an argument.

"Tips

"Your tips will average out, and for this reason we will not tolerate any driver making any gesture of disapproval because some passenger did not tip him. Remember that tips are given for unusual service and you are supposed to render Yellow Cab service on all trips regardless of whether the patrons do or do not tip."

13. The evidence is not satisfactory as to the reason passengers handed tips to the three plaintiffs when paying their taxi fare. The fact the tip was paid them makes it clear that its payment was related in some way to the ride in the taxicab.

14. Plaintiff Andrews reported no tips as income on his tax returns for 1955, 1956 and 1957. The Commissioner of Internal Revenue determined that he received tips totaling $468.73 in 1955, $599.92 in 1956, and $549.54 in 1957. The Commissioner treated these amounts as taxable income and determined deficiencies in tax in the amount of $86 for 1955, $127.54 for 1956, and $111 for 1957. These deficiencies were assessed with interest and thereafter satisfied by payment made by plaintiff on December 29, 1958. On January 8, 1959, plaintiff filed timely claims for refund for 1955-1957.

15. Plaintiffs Albert and Gladys Boyd reported various amounts as income from tips on their joint returns for 1955, 1956 and 1957. The Commissioner of Internal Revenue determined that plaintiff Albert Boyd received tips totaling $640.14 in 1955, $685.76 in 1956 and $634.01 in 1957. These

amounts exceeded those reported on their returns. The Commissioner treated these amounts as taxable income and made certain other adjustments which are not in dispute. Deficiencies in tax in the amount of $95.44 for 1955, $100.70 for 1956, and $93.40 for 1957 were assessed with interest. These assessments were satisfied by payment made by plaintiffs Boyd on November 4, 1958. Thereafter, over-assessments of tax were allowed in the amount of $4.73 for 1955, $2.81 for 1956, and $2.86 for 1957. On January 8, 1959, plaintiffs Boyd filed timely claims for refund for 1955-1957.

16. Plaintiffs William and Lillian Cox reported various amounts as income from tips on their joint returns for 1955, 1956 and 1957. The Commissioner of Internal Revenue determined that plaintiff William Cox received tips totaling $474.27 in 1955, $580.93 in 1956, and $582.48 in 1957. These amounts exceeded those reported on their returns. The Commissioner treated these amounts as taxable income and made certain other adjustments which are not in dispute. Deficiencies in tax in the amount of $103.09 for 1955, $113.50 for 1956, and $108.57 for 1957 were assessed with interest. These assessments were satisfied by payment made by plaintiffs Cox on October 2, 1958. On January 8, 1959, plaintiffs Cox filed timely claims for refund for 1955-1957.

17. The Commissioner of Internal Revenue disallowed the plaintiffs' claims for refund for 1955-1957 and this suit was timely filed on March 10, 1959.

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover, and the petition is therefore dismissed.

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No. 724

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In the Supreme Court of the United States

OCTOBER TERM, 1961

JOHN P. ANDREWS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1961

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the Court of Claims was entered on November 1, 1961. By an order of the Chief Justice dated January 30, 1962, the time within which to file a petition for a writ of certiorari was extended to and including February 13, 1962. The petition for certiorari was filed on February 14, 1962, and is therefore out of time. 28 U.S.C. 2101 (c); Revised Rules of the Supreme Court, Rules 22

(3) and (4), 34(2). The petition for certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX.
Solicitor General.

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